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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 SIERRA CLUB, et al.)
13)
Plaintiffs,)
14 v.)
15 ROGERS C. B. MORTON, et al.,)
16 Defendants.)
17

Civil Action
No. 51464 WTS

18 PLAINTIFFS' MEMORANDUM
19 OF
POINTS AND AUTHORITIES IN OPPOSITION
20 TO
DEFENDANTS' MOTION TO DISMISS
21 THE AMENDED COMPLAINT
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24
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26
27
28
29
30
31
32

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTORY STATEMENT	1
I THE NINTH CIRCUIT DID NOT ESTABLISH THE LAW OF THIS CASE IN IT'S OPINION ON THE PRELIMINARY INJUNCTION	3
A. The Supreme Court Did Not Under- Stand the Ninth Circuit to Have Established the Law of the Case	4
B. The Ninth Circuit Itself Did Not Understand That It Was Establishing the Law Of the Case	4
C. The Law Is Clearly Established That Opinions of Appellate Courts in Review of Preliminary Injunctions Do Not Establish the Law of the Case	5
II THERE ARE FACTS UNDER WHICH PLAINTIFFS' FIRST CLAIM IS LEGALLY SUFFICIENT	7
A. Defendants Action Can, As A Matter Of Fact, Be Inconsistent With the Purpose of 16 U.S.C. §688 Establishing Mineral King As A Wildlife Refuge	8
B. Defendants Cannot, As A Matter Of Fact, Issue Revocable Permits	9
III PLAINTIFFS' FIRST CLAIM FOR RELIEF IS SUFFICIENT AS A MATTER OF LAW	10
A. The Secretary of Agriculture Has No Authority To Issue A Permit Which Will Convert Sequoia National Game Refuge Into A Ski And Summer Resort	11
B. The Secretary of Agriculture Has No Authority To Issue A Permit To Build A Resort on 13,000 Acres Of A National Forest	15
1. The Secretary is Precluded by 16 U.S.C. 497 from Issuing A Permit for a Ski and Summer Resort on 13,000 Acres of National Forest Land	16
2. The Secretary Is Not Authorized by 16 U.S.C. 551 To Issue a Permit for a Ski and Summer Resort on Thousands of Acres of National Forest Land	19

		<u>Page</u>
1	IV	29
2	CONSIDERATION OF PLAINTIFFS' SECOND	
3	CLAIM FOR RELIEF SHOULD BE DEFERRED	
4	UNTIL IT CAN BE DETERMINED WHETHER	
5	OR NOT THAT CLAIM IS MOOT	
6	V	31
7	PLAINTIFFS' THIRD CLAIM FOR RELIEF,	
8	INVOLVING THE NATIONAL ENVIRONMENTAL	
9	POLICY ACT, IS SUFFICIENT AS A MATTER	
10	OF LAW	
11		
12	CONCLUSION	39
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		
29		
30		
31		
32		

TABLE OF CASES AND AUTHORITIES

CASES	PAGE
<u>Arlington Coalition v. Volpe</u> , ____ F.2d ____, 3 ERC 1995 (No. 71-2109, 4th Cir., April 4, 1972).	37
<u>Baltimore & Ohio Ry. v. Jackson</u> , 353 U.S. 325 (1957).	25
<u>Benson Hotel Corp. v. Woods</u> , 168 F. 2d 694 (8th Cir., 1948).	5
<u>Brooks v. Volpe</u> , 319 F. Supp. 90 (W.D. Wash., 1970), rev'd., ____ F.2d ____ (No. 1908, 9th Cir., March 2, 1972).	37, 38
<u>Businessmen v. D.C. City Council</u> , 339 F. Supp. 793 (No. 99-72, D. D.C., March 15, 1972).	37
<u>Calvert Cliffs Coordinating Committee v. AEC</u> , 449 F. 2d 1109 (D.C. Cir., 1971).	34, 35
<u>Chicago v. Federal Power Commission</u> , 385 F. 2d 629 (D. C. Cir., 1967).	27
<u>Chicago, M. & S.P. Ry. v. United States</u> , 218 Fed. 288 (9th Cir., 1914), affirmed, 244 U.S. 351.	20
<u>Chicago, Milwaukee & St. Paul Ry. v. United States</u> , 244 U. S. 351 (1917).	21
<u>Chicot County Drainage District v. Baxter State Bank</u> , 308 U. S. 371 (1940).	27
<u>Cipriano v. City of Houma</u> , 395 U.S. 701 (1969).	27
<u>Council Bluffs v. Omaha & C.B. St. Ry. Co.</u> , 9 F. 2d 246 (8th Cir., 1925).	5a
<u>Daly v. Volpe</u> , ____ F. Supp. ____ (No. 9490, W.D. Wash., March 31, 1972).	37
<u>DeWitt v. Pail</u> , 366 F. 2d 682 (9th Cir., 1966).	8
<u>Douglass v. Pike County</u> , 101 U.S. 677 (1880).	27
<u>Environmental Defense Fund v. Corps of Engineers</u> , 325 F. Supp. 749 (E.D. Ark., 1971).	37
<u>Flood v. Kuhn</u> , 443 F. 2d 264 (2d Cir., 1971).	6
<u>Gelpecke v. Dubuque</u> , 68 U. S. (1 Wall.) 175 (1863).	27
<u>Greene County Planning Board v. F.P.C.</u> , 455 F. 2d 412 (2d Cir., 1972).	37
<u>Hamilton Watch Co. v. Benrus</u> , 206 F. 2d 738 (2d Cir., 1953).	3, 5

TABLE OF CASES AND AUTHORITIES (continued)

CASES	PAGE
<u>Houghton v. Payne</u> , 194 U.S. 88 (1904).	23, 24
<u>Hunter v. Atchison</u> , 188 F. 2d 294 (7th Cir., 1951).	5
<u>Investment Company Institute v. Camp</u> , 401 U.S. 617 (1971).	24
<u>Iselin v. United States</u> , 270 U.S. 245 (1926).	24
<u>Johnson v. New Jersey</u> , 384 U.S. 719 (1966).	27
<u>Lathan v. Volpe</u> , 455 F. 2d 1111 (9th Cir., 1971).	37, 38
<u>Light v. United States</u> , 220 U. S. 523 (1971).	20
<u>Linkletter v. Walker</u> , 381 U.S. 618 (1965).	27
<u>Louisville & N.R. Co. v. United States</u> , 282 U.S. 740 (1931).	24
<u>McMichael v. United States</u> , 355 F. 2d 283 (9th Cir., 1965).	20
<u>Meiselman v. Paramount Film Distributing Corp.</u> , 180 F. 2d 94 (4th Cir., 1950).	5a
<u>Miami Beach Fed. S & L Ass'n. v. Callander</u> , 256 F. 2d 410 (5th Cir., 1958).	5
<u>Morningside-Lenox Park Ass'n. v. Volpe</u> , 334 F. Supp. 132 (N.D. Ga., 1971).	37
<u>Nantahala Power & Light Co. v. Federal Power Commission</u> , 384 F. 2d 200 (4th Cir., 1967), cert. denied 390 U.S. 945.	25
<u>National Labor Relations Board v. Majestic Weaving Co.</u> , 355 F.2d 854 (2d Cir., 1966).	27
<u>Nolop v. Volpe</u> , 333 F. Supp. 1364 (D. So. Dak., 1971).	37
<u>Norwegian Nitrogen Products Co. v. United States</u> , 288 U.S. 294 (1933).	24
<u>Phoenix v. Kolodziejewski</u> , 399 U.S. 204 (1970).	27
<u>Rabin v. Rowan Memorial Hospital</u> , 269 N.C. 1, 152 S.E. 2d 485 (1967).	27
<u>Ross-Whitney Corp. v. Smith, Kline & French Lab</u> , 207 F. 2d 190 (9th Cir., 1953).	5
<u>Safarik v. Udall</u> , 304 F. 2d 944 (D.C. Cir., 1962), cert. denied, 371 U.S. 901.	27

1	<u>TABLE OF CASES AND AUTHORITIES (continued)</u>	
2	<u>CASES</u>	<u>PAGE</u>
3	<u>Salerno v. American League of Prof. Baseball Clubs</u> , 429 F. 2d 1003 (2d Cir., 1970).	6
4	<u>Sanford's Estate v. Commissioner</u> , 308 U.S. 39 (1939).	25
6	<u>Sherwin v. Welch</u> , 319 F. 2d 729 (D.C. Cir., 1963).	7
7	<u>Sierra Club v. Hickel</u> , 433 F. 2d 24 (9th Cir., 1970).	1 - 10, 23
9	<u>Sierra Club v. Morton</u> , 405 U.S. 727 (1972).	1, 2, 4
10	<u>Sooner State Dairies, Inc. v. Townley's Dairy Co.</u> , 406 F. 2d 1328 (10th Cir., 1969).	5a
11	<u>Stovall v. Denno</u> , 388 U.S. 293 (1970).	27
12	<u>Tookson v. New York Yankees</u> , 101 F. Supp. 93 (S.D. Cal., 1951).	6
14	<u>Toucey v. New York Life Ins. Co.</u> , 314 U.S. 118 (1941).	25
15	<u>United States v. Grimaud</u> , 220 U.S. 506 (1911).	20, 21, 22
16	<u>United States v. Leslie Salt Co.</u> , 350 U.S. 383 (1956).	24
18	<u>United States v. Missouri Pac. Ry.</u> , 278 U.S. 269 (1929).	24
19	<u>United States v. San Francisco</u> , 310 U.S. 16 (1940).	25
21	<u>Webb & Co. v. Robert Miller Co.</u> , 176 F. 2d 678 (3rd Cir., 1949).	6, 7
22	<u>Young v. Motion Picture Association of America</u> , 299 F. 2d 119 (D.C. Cir., 1962).	5
25	<u>LEGISLATIVE MATERIALS</u>	
26	S. Rep. No. 243, 73d Cong., 2d Sess. 1 (1934).	14
27	S. Rep. No. 2511, 84th Cong., 2d Sess. 1 (1956).	23
28	S. Rep. No. 2511, 84th Cong., 2d Sess. 3 (1956).	18, 26
29	H.R. Rep. No. 902, 69th Cong., 1st Sess 2	12
30	H. Rep. No. 2792, 84th Cong., 2d Sess. 2 (1956).	23
31	H. Rep. No. 2792, 84th Cong., 2d Sess. 3 (1956).	18, 26
32		

1	<u>TABLE OF CASES AND AUTHORITIES (continued)</u>	
2	<u>LEGISLATIVE MATERIALS</u>	<u>PAGE</u>
3	Hearings on H.R. 1809 before the House	
4	Committee on Agriculture, June 19, 1947, 80th Cong., 1st Sess. 3.	17,18,25
5	Hearings on H.R. 4095 before the House	
6	Committee on Agriculture, Feb. 27-28, 1924, 68th Cong., 1st Sess. 23.	13
7	Hearings on H.R. 5006 before the House	
8	Committee on Public Lands, Feb. 24-26, 1920, 66th Cong., 2d Sess. 38.	11
9	Hearings on H.R. 9387 before the House	
10	Committee on Agriculture, April 7,8, 10, 1926, 69th Cong., 1st Sess. 57-38.	13
11	Hearings on H.R. 13679 before the House	
12	Committee on Agriculture, Dec. 12, 1913, 63d Cong., 2d Sess. 304.	17
13	29 Cong. Rec. 902 (Feb. 22, 1897).	19,20
14	California State Assembly Bill No. 1556,	
15	August 18, 1972.	29
16		
17	<u>STATUTES</u>	
18	26 Stat. 1103.	19
19	30 Stat. 35.	20
20	30 Stat. 729.	20
21	30 Stat. 1233.	21
22	31 Stat. 790.	21
23	38 Stat. 1101.	17
24	70 Stat. 708.	18, 25
25	16 U.S.C. 79.	21
26	16 U.S.C. 471.	19
27	16 U.S.C. 497.	9, 15, 16, 18, 25
28		
29	16 U.S.C. 551.	15, 19-24, 27
30	16 U.S.C. 688.	8, 11, 13, 14
31	16 U.S.C. 694	14
32	42 U.S.C. 4321, <u>et seq.</u>	14, 31-38

TABLE OF CASES AND AUTHORITIES (continued)

EXECUTIVE MATERIALS

PAGE

30 Att'y Gen. 263 (1914).	21, 22
36 C.F.R. 211.20-211.37	23
Forest Service Manual, §1571.01.	23
Forest Service Manual, §2711.2(5).	26
Forest Service Manual, §2716.3(1).	23
Forest Service Emergency Directive No. 1, F.S.M. §1940.3, ELR 46058 (July 13, 1971).	33, 38, 39
Guidelines of the Department of Agriculture (re NEPA implementation), Appendix C, ELR 46057.	33
Guidelines of the President's Council on Environmental Quality, 36 Fed. Reg. 7724, ELR 46049 (April 23, 1971).	33, 38

MISCELLANEOUS

<u>Atlantic Monthly</u> , January 1898.	11
2A Moore, <u>Federal Practice</u> , ¶12.08.	7
7 Moore, <u>Federal Practice</u> , ¶65.21	5, 30
<u>National Parks Association Bulletin #34</u> , July 6, 1923.	12
<u>Sequoia and Kings Canyon National Parks Natural Sciences Research Plan</u> , edited by Lowell Sumner, Dept. of Interior, April 1966.	12
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Strong, Douglas Hillman, <u>Trees or Timber: The Story of Sequoia and King's Canyon National Parks</u> , Palo Alto, Calif., 1949.	11, 12
Walker, Gordon E., "Remarks," May 3, 1972.	29, 30.

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12	SIERRA CLUB, et al.	)	
		)	Civil Action
13	Plaintiffs,	)	No. 51464 WTS
		)	
14	v.	)	PLAINTIFFS' MEMORANDUM OF
		)	POINTS AND AUTHORITIES
15	ROGERS C. B. MORTON, et al.,	)	IN OPPOSITION TO DEFENDANTS'
		)	MOTION TO DISMISS
16	Defendants.	)	THE AMENDED COMPLAINT
		)	

17

18 On April 19, 1972, the United States Supreme Court
19 affirmed the Ninth Circuit's ruling vacating the preliminary
20 injunction of this court. Sierra Club v. Morton 405 U.S. 727
21 (1972). The Supreme Court's sole ground was that the Sierra
22 Club had not alleged a sufficient interest in its complaint
23 to maintain its standing. The Ninth Circuit had not only
24 ruled on standing, but had also said that the Club had not
25 shown with sufficient likelihood that its action would succeed.
26 In making its observations on the merits, however, the Ninth
27 Circuit stated: "We recognize that in appraising these issues
28 on a preliminary basis, our function is not to make an original
29 judgment or to make a final decision on the merits." Sierra
30 Club v. Hickel, 433 F.2d 24, 33-34.

31 With regard to the issue of likelihood of success on the
32 merits, the Supreme Court specifically stated ". . . we do not

1 reach any other questions presented, and we intimate no views
2 on the merits of the complaint." 405 U.S. at 741. The
3 court then specifically stated:

4 "Our decision does not, of course, bar
5 the Sierra Club from seeking in the district
6 court to amend its complaint by a motion
under Rule 15, Federal Rules of Civil Procedure."
405 U.S. at 736.

7 Pursuant to that suggestion of the Supreme Court, the Club
8 moved to amend its complaint to (1) allege its interest
9 in Mineral King for purposes of standing, (2) to add certain
10 additional parties, and (3) to add a third claim for relief
11 under the National Environmental Policy Act, 42 U.S.C. §§ 4321,
12 et seq. ("NEPA").

13 Over the opposition of the defendants, this court
14 granted the Club's motion to amend by Order of July 6, 1972.
15 In its opinion, however, this court stated:

16 "It should be noted, however, that while the
17 Supreme Court thus apparently envisioned these
18 curative amendments with respect to the threshold,
19 procedural issue of standing, it omitted to resolve
20 or even mention the Ninth Circuit Court of Appeals
21 further ruling on the merits to the effect that,
22 even assuming standing, plaintiff had failed to
establish ground for preliminary injunction against
the defendant federal agencies - a ruling made in
an opinion (433 F.2d 24, (9th Cir., 1970)) that goes
far toward establishing the "law of the case"
on the merits as far as this District Court is
concerned.

23 It is not necessary, however, upon mere motion
24 to amend, to consider whether for this reason
25 further proceedings in this case may be an exercise
in futility."

26 The defendants have now moved to dismiss the plaintiffs' first
27 and second claims in order to allow this court to settle
28 whether or not the Ninth Circuit has established the law of
29 the case. Plaintiffs will demonstrate herein
30 that the Ninth Circuit did not establish the law of the case.

31 With regard to plaintiffs' third claim, this court said:

32 "Additionally, plaintiff seeks to add an

1 entirely new cause of action based upon the
2 National Environmental Policy Act, 42 U.S.C.
3 §4321, et seq., which became effective on
January 1, 1970, during the pendency of this
litigation.

4 We see no good reason why plaintiff should
5 not be permitted to file this new and separate
6 cause of action - subject, of course, to further
consideration as to whether violation of that
Act is sufficiently alleged."

7 The defendants have now chosen to raise the legal sufficiency
8 of the third claim. Plaintiffs will also demonstrate herein
9 that there is no merit whatsoever to defendants' contention
10 that plaintiffs' third claim is insufficient.

11 I

12 THE NINTH CIRCUIT DID NOT ESTABLISH
13 THE LAW OF THIS CASE
14 IN ITS OPINION ON THE PRELIMINARY INJUNCTION

15 The defendants take the position that the Ninth Circuit
16 established the law of the case in its opinion on the
17 Preliminary Injunction. The law is clear, however, that
18 opinions on either the law or the facts by appellate courts
19 on preliminary injunctions are not binding on trial courts
20 when they later make their final determination on the merits.
21 Thus, the Ninth Circuit's opinion was only tentative and
22 preliminary and does not bind this court in making a final
23 determination. The narrow scope of appellate court review
24 of preliminary injunctions reflects their nature: " . . .
25 interlocutory, tentative, provisional, and interim, impermanent,
26 mutable, not fixed or final or conclusive, characterized by
27 its-for-the-time-beingness." Hamilton Watch Co. v. Benrus,
28 206 F.2d 739, 742 (2d Cir., 1953). Neither the trial court nor
29 the Appellate Court determines the merits in considering a
30 preliminary injunction, but instead merely considers whether the
31 status quo should be maintained pending a final determination of the
32 case. Thus, the Ninth Circuit has not established the "law of
the case" nor estopped this court from again reviewing all

1 questions of law in making its final determination.

2 A. The Supreme Court Did Not Understand the
3 Ninth Circuit to Have Established the Law
4 Of the Case

5 The Supreme Court held that the Sierra Club did not
6 allege the proper grounds for standing in its complaint.
7 In footnote 8, 405 U.S. at 736, however, the Supreme Court
8 suggested that the Sierra Club could amend its complaint to
9 cure that deficiency.

10 However, had the Ninth Circuit established the law of
11 the case on the merits, then the act of amendment for purposes
12 of standing would be an act of futility. The Supreme Court
13 obviously, would not suggest such a useless and futile
14 procedure. The Supreme Court must have assumed that the
15 general rule applied in this case and that the law of the
16 case had not been established.

17 Defendants falsely suggest at page 3 of their Memorandum
18 in Support of their Motion to Dismiss that the Supreme Court
19 suggested that the Club amend "to state a claim for relief if
20 it could." However, as defendants well know, the Supreme
21 Court's suggestion was only directed to the plaintiff's
22 standing allegations. Indeed, the Court specifically stated
23 it was not considering the merits. See pp. 1-2, supra.

24 B. The Ninth Circuit Itself Did Not Understand
25 That It Was Establishing the Law of the Case

26 The Ninth Circuit did not make a final determination
27 of the merits or lay down the law of this case. Rather it
28 made a tentative judgment of the probable final determination
29 by the trial court of the merits for purposes of a preliminary
30 injunction. It well knew that the final determination could
31 and might be contrary to its estimate. In so recognizing
32 this principle, the Ninth Circuit prefaced its opinion as follows:

1 "We recognize that in appraising these
2 issues even on a preliminary basis, our function
3 is not to make an original judgment or to
4 make a final decision on the merits. See, e.g.,
5 Public Service Commission of Wisconsin v. Wisconsin
6 Tel. Co., 289 U.S. 67, 70 (1933); Industrial Bank
7 of Washington v. Tobriner, 405 F.2d 1321, 1324
8 (D.C. Cir., 1968)." 433 F.2d at 33-34.

9 Had the Ninth Circuit established the law of the case, then
10 it would have, in its opinion, ordered the trial court to
11 dismiss on remand as any further proceedings would have been
12 futile.

13 C. The Law is Clearly Established That Opinions
14 Of Appellate Courts in Review of Preliminary
15 Injunctions Do Not Establish the Law of the Case

16 Moore states the general rule on the question at hand
17 with characteristic succinctness as follows:

18 ". . . the general rule is that the
19 decision of either the trial or appellate
20 court in granting or denying a temporary
21 injunction does not estop the parties of
22 the court as to the merits of the case."
23 7 Moore, Federal Practice ¶65.21, 1703.

24 The Eighth Circuit stated the rule a bit more fully in Benson
25 Hotel Corp. v. Woods, 168 F.2d 694, 697 (8th Cir., 1948):

26 "The decision of the trial court in
27 granting a motion for preliminary injunction
28 will not estop either of the parties on the
29 trial of the case on its merits, nor would any
30 determination of the merits by the court on
31 appeal from such injunction be binding on the
32 trial court or upon either of the parties in con-
sidering and determining the merits of the controversy."

33 Accord, Ross-Whitney Corp. v. Smith, Kline & French Lab. 207
34 F.2d 190, 199 (9th Cir., 1953); Young v. Motion Picture
35 Association of America, 299 F.2d 119, 121 (D.C. Cir., 1962);
36 Miami Beach Fed. S & L. Ass'n. v. Callander, 256 F.2d 410, 415
37 (5th Cir., 1958); Hamilton Watch Co. v. Benrus Co., 206 F.2d 738,
38 743 (2d Cir., 1953); Hunter v. Atchison, 188 F.2d 294, 298-299
39 (7th Cir., 1951); Council Bluffs v. Omaha & C.B. St. Ry. Co.,

1 9 F.2d 246, 249 (8th Cir., 1925); Meiselman v. Paramount
2 Film Distributing Corp., 180 F.2d 94, 97 (4th Cir., 1950).
3 Also see Sooner State Dairies, Inc. v. Townley's Dairy Co.,
4 406 F.2d 1328 (10th Cir., 1969).

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1 Thus, the law is clear that statements and rulings of
2 an appellate court on the likelihood of success on the merits
3 in reviewing a preliminary injunction are not binding on the
4 district court upon remand and that the district court,
5 when making its final determination, is free to
6 make its own judgment.

7 The cases cited by defendants do not suggest any
8 exception to this rule. Indeed, none of defendants' cases
9 are even on the point in question. At page 3 of his memorandum
10 counsel for the defendants cites five cases for the proposition
11 that the "trial court after remand must follow the law of the
12 case." None of those five cases involved a remand from
13 review of a decision granting or denying a preliminary
14 injunction. Three of these cases 1/ involved the question
15 of whether, upon motion to dismiss, a District Court should
16 follow a 1920 precedent of the Supreme Court holding professional
17 baseball not to be interstate commerce for purposes of the
18 anti-trust laws. The courts in these cases simply held they
19 were bound by the precedents of the Supreme Court. (Two of
20 the baseball cases were miscited by defendants as 9th Circuit
21 cases when, in fact, they are 2d Circuit cases). 2/

22 The other two cases cited by the defendant are equally
23 inappropriate. In the case of Webb & Co. v. Robert Miller Co.,
24 176 F.2d 678 (3rd Cir., 1949), the Court of Appeals reversed
25 a motion to dismiss. On a subsequent appeal, the Court of
26 Appeals stated that an issue of law settled on the first appeal
27 cannot be relitigated at the trial upon reinstatement.

28 _____
29 1/ Toolson v. New York Yankees, 101 F.Supp. 93 (S.D. Cal.,
30 1951); Salerno v. American League of Prof. Baseball Clubs, 429
31 F.2d 1003 (2d Cir., 1970) (Miscited by defendants as a 9th
Circuit case), and Flood v. Kuhn, 443 F.2d 264 (2d Cir., 1971)
(Miscited by defendants as a 9th Circuit case).

32 2/ Ibid.

1 Plaintiffs have no quarrel with this holding as the first
2 appeal in Webb was from a final, not a preliminary, determination.

3 The last case cited by defendants, Sherwin v. Welch, 319
4 F.2d. 729 (D.C. Cir., 1963), is very remote indeed from the
5 issue before us. In that case the Court of Appeals remanded
6 the case following an appeal from a final determination. A
7 disagreement developed as to what the Court of Appeals had
8 meant on one point. On the second appeal the question was
9 not whether the Court of Appeals had established the law of the
10 case on the prior appeal, but what the court had meant in its
11 first opinion.

12 Thus, to summarize, the law is clear that following
13 an appellate decision on a preliminary injunction, the trial
14 court is not estopped to redetermine any issue of fact or
15 law. Counsel for defendants have cited no authority whatso-
16 ever to the contrary.

16 II

17 THERE ARE FACTS UNDER WHICH 18 PLAINTIFFS' FIRST CLAIM IS 19 LEGALLY SUFFICIENT

20 The Ninth Circuit made its determination regarding the
21 preliminary injunction before there had been a trial on the
22 merits. The Court of Appeals based its review of that prelimin-
23 ary determination on the record before it, which consisted of
24 affidavits concerned with such issues as irreparable harm.
25 At this hearing, however, the Court must consider two
26 aspects of the case which were not considered by the Court
27 of Appeals.

28 First, for purposes of a motion to dismiss for failure
29 to state a claim, the allegations of fact are taken as admitted
30 second,
31 and, the complaint should not be dismissed "unless it appears
32 to a certainty that plaintiff is entitled to no relief under
any state of facts which could be proved in support of the
claim." 2A Moore, Federal Practice, pp. 2274 (¶12.08). (Emphasis
in original.)

1 In the words of the Ninth Circuit:

2 "A complaint is not subject to dismissal
3 upon the ground that it fails to state a
4 claim unless it appears beyond doubt that
5 the plaintiff can prove no set of facts in
6 support of his claim which would entitle
7 him to relief. Conley v. Gibson, 355 U.S. 41
8 78 S.Ct. 99, 2 L.Ed. 2d 80; Marshall v. Sawyer,
9 9th Cir., 301 F.2d 689, 647. In applying
10 this test it is to be borne in mind that the
11 spirit of the Federal Rules of Civil Procedure
12 require us to construe the pleadings most strongly
13 in favor of the pleader, Metropolitan Life Ins. Co. v.
14 Fugate, 313 F.2d 788, 795 (5th Cir., 1963)"
15 DeWitt v. Pail, 366 F.2d 682, 685 (9th Cir., 1966).

16 In this case there are obviously some sets of fact, based on
17 the complaint, that would entitle plaintiffs to relief.

18 A. Defendants Action Can, As A Matter Of Fact, Be
19 Inconsistent With the Purpose of 16 U.S.C. §688
20 Establishing Mineral King As A Wildlife Refuge

21 Plaintiffs, by ¶3 of the Amended Complaint allege, among
22 other things, that "the ski development would destroy the scenic,
23 natural, wildlife and historic aspects of the Mineral King area."
24 For purposes of this motion, this allegation must be taken as true.

25 16 U.S.C. §688 provides, in part, that:

26 ". . . nothing contained in this section
27 shall prevent the Secretary of Agriculture
28 from permitting other uses of said lands
29 under and in conformity with the laws and
30 rules and regulations applicable thereto so
31 far as may be consistent with the purposes
32 for which said game refuge is established."
(Emphasis added.)

33 It is clear that if plaintiffs establish their allegation of
34 fact, by showing, for example, substantial interference with the
35 resident wildlife and habitat, there can be no question of the
36 matter. No amount of discretion in the Secretary can encompass
37 the destruction of the Game Refuge itself and the Ninth Circuit's
38 opinion could not be so interpreted. 3/

39 3/ It is also plaintiffs position that the defendants'
40 treatment of the Game Refuge is inconsistent with the purposes
41 for which it was established as a matter of law. See pp. 11-15
42 below.

1 The Ninth Circuit did not address itself to the quoted
2 allegation which was added by the amendment, but simply said
3 "The appellee has not shown with any degree of certainty that
4 it will or can succeed." Plaintiffs, however, are entitled
5 to their day in court, and are confident they will make an
overwhelming record.

6 B. Defendants Cannot, As A Matter Of
7 Fact, Issue Revocable Permits

8 It is plaintiff's position that defendants cannot issue
9 permanent or thirty year permits in excess of 80 acres under
10 16 U.S.C. §497. Plaintiffs allege by ¶7, among other things,
11 that the permittee "will physically occupy and affect areas
12 far in excess of 80 acres of land." 4/ This allegation,
13 coupled with the allegation of ¶3 above that "the ski
14 development would destroy the scenic, natural, wildlife and
15 historic aspects of the Mineral King area" makes it clear, if
16 true, that the Secretary, has exceeded his discretion, even if it
17

18 4/ The full allegation of ¶7 reads as follows:

19 7. On or about 21 January, 1969, the Forest Service
20 approved the proposed plan of Developer for the commercial-
21 recreational development of Mineral King. Plaintiff is informed
22 and believes and based upon such information and belief alleges
23 that under the approved plan the development will have at least
24 the following features:

25 (a) An "alpine village" and associated structures
26 permanent in nature including parking structure, restaurants,
27 lodging facilities, sewage treatment facilities, swimming and
28 ice skating facilities which will physically occupy and affect
29 areas far in excess of 80 acres of land;

30 (b) Ski-lifts, cleared slopes, lift lines, trails, roads,
31 a cog-assisted railroad, water and stream control features,
32 avalanche dams and other recreational "improvements" throughout
13,000 acres directly affecting by actual construction and
development an area occupying nearly 400 acres of land;

 (c) The year-long use of the resort will include the
presence in said area of an estimated 1,200 vehicles per hour
each way on an access road which is proposed to cross Sequoia
National Park to the development, 3,600 parked vehicles, the
lodging of 3,310 transient guests per night, up to 8,500 skiers
per day, the permanent housing of 700 or more employees and
986,000 or more total visitors per year as early as 1978; and

 (d) The exact nature of other details is not yet known
to plaintiff, which prays leave to insert them when discovered.

1 is as broad as the Ninth Circuit suggests.

2 Defendants authority for issuing more than 80 acres
3 worth of permits depends on the fact that the permits for the
4 thousands of excess acres will in fact be revocable. Plaintiffs
5 intend to show, as a matter of fact, that the permits will not
6 meet any of the criteria for revocable permits. 5/

7 III

8 PLAINTIFFS' FIRST CLAIM
9 FOR RELIEF IS SUFFICIENT
10 AS A MATTER OF LAW

11 Plaintiffs' first claim for relief concerns the
12 legality of the actions of the Forest Service in issuing
13 permits for a ski resort in Mineral King. As we will
14 demonstrate, it is sufficient as a matter of law.

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31 5/ As with the point concerning the game refuge, plain-
32 tiffs will show below, pp. 15-28, that this aspect of their
claim is sufficient as a matter of law.

1 A. The Secretary of Agriculture Has No Authority
2 To Issue a Permit Which Will Convert Sequoia
3 National Game Refuge into a Ski and Summer
4 Resort

5 We submit that the Secretary of Agriculture has no authority
6 to allow the construction of a major ski and summer resort
7 occupying virtually the entire Sequoia National Game Refuge.

8 Sequoia National Game Refuge was established in 1926
9 by 16 U.S.C. 688 which specifically stated its purpose:

10 [I]t is the purpose of this section to
11 protect from trespass the public lands of
12 the United States and game animals which
13 may be thereon [T]he land included
14 in said game refuge shall continue to be
15 parts of the Sequoia National Forest and nothing
16 contained in this section shall prevent the
Secretary of Agriculture from permitting other
uses of said lands under and in conformity with
the laws and rules and regulations applicable
thereto so far as may be consistent with the
purposes for which said game refuge is established.
(Emphasis added.)

17 Consequently, it is clear that the Secretary has authority to
18 issue term permits at Mineral King only so far as the other
19 and wildlife habitat
uses will protect the wildlife/in the refuge.

20 Mineral King is virtually surrounded by Sequoia National
21 Park and is integrally related to the park. When Mineral King
22 was solely within Sequoia National Forest, the Sierra Club did
23 not regard this protection as sufficient. John Muir
24 specifically complained about the lack of care taken of the
25 area. Atlantic Monthly, January 1898, p. 27. On the other
26 hand, the Forest Service opposed including the area in the
27 park because of mineral claims there. 6 / Sequoia National
28 Game Refuge was created as a compromise between putting the
29

30 6 / Strong, Douglas Hillman. Trees or Timber: The Story
31 of Sequoia and King's Canyon National Parks, Palo Alto, Calif.,
32 1949, p. 44, Hearings Before the House Committee on Public
Lands on H.R. 5006 February 24-26, 1920, 66th Cong. 2nd Sess.
38.

1 area in Sequoia National Park, under the administration of
2 the Park Service, or excluding the area and leaving its
3 administration under the Forest Service.

4 In 1921 the Sierra Club suggested that "[s]hould the
5 three southern townships [near Mineral King] be removed from
6 the park, steps should be taken to protect the deer and other
7 game, which for thirty years, since the creation of the park
8 in 1890, have enjoyed a full measure of Government protection."
9 The Sierra Club repeated this suggestion in 1923 when the
10 Forest Service was opposing the inclusion of the three southern
11 townships and Mineral King in the park. In May 1923 the
12 Sierra Club stated, "We feel that the retention of these
13 three townships within the park is a matter of great importance,
14 by means of the fact that large numbers of deer and other
15 game, which live in the higher regions of the park during the
16 summertime, make these three townships their winter home." 7/

17 The Sierra Club itself suggested the compromise with
18 regard to Mineral King that it be made a game refuge. 11 Sierra
19 Club Bulletin 324; Strong, Trees or Timber, supra, p. 44; R.
20 Rep. No. 902, 69th Cong., 1st Sess. 2. One of the reasons for
21 this suggestion was to protect the game in the area. "At the
22 time that the question of eliminating these three townships
23 was discussed, . . . an answer to this objection that the game
24 would be without protection in the winter time, it was suggested
25 that a game refuge, either State or Federal, might be established." 8/

26 7/ A recent study by the Park Service indicates this
27 migration still occurs: "The oft-repeated observation that
28 these parks are not self-sufficient ecological islands but
29 are markedly susceptible to outside influences, is well
30 illustrated by changes in the animal life. These changes
31 are accentuated by the animals' mobility . . . [T]he
ecological interrelationships and ultimate results of such
animal movements across park boundaries have received scarcely
any detailed study." Sequoia and Kings Canyon National
Parks Natural Sciences Research Plan, edited by Lowell Sumner,
Dept. of the Interior, April 1966, p. 21

32 8/ National Parks Association Bulletin #34, July 6, 1923.

1 The Forest Service agreed to this compromise. In 1924
2 Chief Forester Greeley testified, "There is one feature of
3 the bill (H.R. 4095) which the Forest Service has asked
4 Mr. Barbour to include and that is the creation of a Federal
5 game preserve to cover this peninsula." 9/

6 Two years later Mr. Greeley again testified in support of
7 the game refuge in the hearings which led to 16 U.S.C. 688: 10/

8 Mr. Chairman: Will the game refuge be subject to
9 grazing?

10 Mr. Greeley: I think not. There may be a little
11 grazing in there, but practically none.

12 Mr. Chairman: You will not permit grazing in there?

13 Mr. Greeley: No, sir; grazing ought to be excluded
14 from the game refuge area.

15 Mr. Chairman: What is the particular reason for
16 segregating this and setting it aside as a game refuge?

17 Mr. Greeley: In the first place we felt that the
18 Mineral King area should be kept out of the park,
19 because there is a considerable section of mineral-
20 ized territory there that has been prospected and
21 mined in a small way for a good many years. Now
22 leaving that out of the park, you can readily appre-
23 ciate that with the park boundaries surrounding this
24 little peninsula of natural forest land, all but the
25 little neck, it would be extremely easy to have
26 poaching on park lands if hunting were permitted
27 on national forest lands. Aside from that there is a
28 very valuable deer herd in this region partly in the
29 national forest and partly in the present park, and
30 we think as a matter of game conservation it is
31 desirable to enlarge somewhat the area subject to
32 special protection. This is one of the big breeding
grounds of deer for the whole southern Sierra region.

While the three southern townships were retained in the park,
Mineral King still became a game refuge in the 1926 statute.

Thus, Congress accepted the compromise on the basis that
the refuge would adequately protect wildlife. The Forest

29 9/ Hearings on H.R. 4095 before the House Committee on
30 Agriculture, February 27-28, 1924, 68th Cong., 1st Sess. 23.

31 10/ Hearings on H.R. 9387 before the House Committee
32 on Agriculture, April 7, 8 and 10, 1926, 69th Cong., 1st
Sess. 57-58.

1 Service assured Congress before the national refuge was
2 created that it would not even permit grazing in order to
3 protect deer and other wildlife. Now the Forest Service
4 has decided to reject unilaterally the compromise which
5 was embodied in the plain language of Section 688. This
6 language should be strictly construed particularly in the light
7 of the national policy, adopted in the National Environmental
8 Policy Act, to protect this country's remaining wildlife and
9 unspoiled areas of great natural beauty. 42 U.S.C. 4321-4325.

10 Sequoia National Game Refuge is one of the few wildlife
11 refuges created by Congress. Subsequently, in 1934, Congress
12 passed 16 U.S.C. 694 which delegated to the President the
13 power to create wildlife refuges. Section 694 provides that
14 the President may establish "fish and game sanctuaries or
15 refuges which shall be devoted to the increase of game
16 birds, game animals, and fish of all kinds naturally adapted
17 thereto" The Senate report on Section 694 stated: 11/

18 The purposes of this bill are far-reaching
19 and commendable. Over a period of years, the wildlife
20 of this country has shown a marked decrease due to
21 many causes, the most important ones being:

22 1. The advance of civilization which restricts
23 the breeding and feeding grounds of our wildlife.

24 Thus, the purpose of wildlife refuges is to provide an area
25 where wildlife are protected from the very kinds of activities
26 which the Secretary intends to permit in this case.

27 We submit that the construction of any substantial resort
28 in a national game refuge violates Section 688. If an
29 evidentiary hearing is provided, the Sierra Club would be
30 able to demonstrate that the 30-year term permit, even if
31 this were the only permit, would violate the statute because the
32 construction and subsequent activities on this land alone
33 would not be consistent with the wildlife refuge. In any event,

11/ S. Rep. No. 243, 73d Cong., 2d Sess. 1 (1934).

1 we submit

2 that the combination of the term permit for 80 acres and the
3 revocable permit for 13,000 acres would destroy the refuge.

4 The Secretary has no authority to issue any kind of
5 permit for activity inconsistent with the protection of wild-
6 life. If there is any doubt on this issue, the plaintiff
7 should have the opportunity to introduce evidence in the
8 district court to show that the resort will destroy the wild-
9 life habitat and destroy the usefulness of the game refuge.

10 B. The Secretary of Agriculture Has No Authority
11 To Issue a Permit To Build a Resort on 13,000
12 Acres of a National Forest

13 The Forest Service has made its determination to issue Walt
14 Disney Enterprises two permits. First, it intends to grant a
15 30-year permit for 80 acres of land within both Sequoia
16 National Refuge and Forest pursuant to 16 U.S.C.
17 497:

18 The Secretary of Agriculture is authorized . . .
19 (a) to permit the use and occupancy of suitable
20 areas of land within the national forests, not
21 exceeding eighty acres and for periods not exceeding
22 thirty years, for the purpose of constructing or
maintaining hotels, resorts, and any other
structures or facilities necessary or desirable
for recreation, public convenience or safety
(Emphasis added.)

23 Second, the Forest Service intends to grant a purportedly
24 permanent facilities on
revocable permit for/thousands of additional acres of land
25 within Sequoia National Refuge and Forest pursuant to 16 U.S.C.
26 551:

27 The Secretary of Agriculture shall make
28 provisions for the protection against destruction
by fire and depredations upon the public forests
29 and national forests . . . and he may make such
rules and regulations and establish such service
30 as will insure the objects of such reservations,
namely, to regulate their occupancy and use and
31 to preserve the forests thereon from destruction

32 We submit that neither this statute, as its language, history,

1 and administrative construction demonstrate, nor the inherent
2 authority of Secretary of Agriculture allow him to permit
3 the construction of a ski and summer resort on thousands of
4 acres of land in a national forest. We further submit that
5 16 U.S.C. 497 precludes him from issuing permits for the use
6 of more than 80 acres of national forest land for a resort.

7 1. The Secretary Is Precluded by 16 U.S.C.
8 497 from Issuing a Permit for a Ski and
9 Summer Resort on 13,000 Acres of National
10 Forest Land

11 We submit that the action of the Secretary of Agriculture in
12 granting a permit for the construction of major, permanent
13 facilities on 13,000 acres was an effort to circumvent the
14 restrictions of the statutes limiting his authority to grant
15 term permits in national forests. Besides 16 U.S.C. 497
16 (a), which allows the Secretary to make 30-year term permits
17 for 80 acres for hotels and resorts and under which he granted
18 the permit in Mineral King, the Secretary can enter 30-year
19 permits for 5 acres to construct homes or stores (id. at 497(b));
20 80 acres for buildings for industrial or commercial purposes
21 (id. at 497(c)); and 80 acres for buildings for education or
22 other public use which are owned by governmental or nonprofit
23 agencies (id. at 497(d)). He may also lease 2 acres without
24 limitation of time for schools or churches (id. at 479) and
25 "suitable spaces . . . near, or adjacent to, mineral, medicinal
26 or other springs" for sanitariums or hotels (id. at 495).
27 Thus, Congress has carefully specified the amount of land which
28 can be used in national forests for the construction of
29 permanent facilities including explicitly resorts.

30 The legislative history of 16 U.S. 497 makes clear that
31 Congress did not intend to allow permits for resorts to extend
32 beyond 80 acres. The Forest Service sought from Congress in

1 1914 authority to grant term permits without limitation as to
2 acreage. H.R. 13679, 63d Cong., 2d Sess., provided "that
3 hereafter the Secretary of Agriculture may, when necessary for
4 the purpose of increasing the public benefits or public use
5 of the National Forests, rent or lease to responsible persons
6 or corporations for periods of not to exceed 20 years,
7 suitable spaces or portions of ground for the construction
8 of summer residences, hotels, stores, or any structure
9 needed for recreation or convenience." Congressman Howley
10 stated that "this amendment went into the bill on the
11 special recommendation of the Forest Service." 51 Cong. Rec.
12 4771.

13 Congressman Taylor objected to this section at hearings
14 on the bill - "The trouble with making such a law is this. It
15 shuts out a great many people." Hearings on H.R. 13679 before
16 the House Committee on Agriculture, December 12, 1913 63d
17 Cong., 2d Sess. 304. The bill did not pass. The following
18 year, Congress passed a statute giving the Forest Service
19 the authority to grant term permits for hotels and resorts but
20 limited the amount of land to 5 acres. 38 Stat. 1101.

21 H.R. 1809, which would have enlarged the authority of
22 the Forest Service to grant permits for hotels and resorts
23 to 80 acres, was introduced in 1947. 80th Cong., 1st Sess.
24 C.M. Granger of the Forest Service testified that extensive
25 activities could not be encompassed within 5 acres and that
26 only a revocable permit could be given for additional land.
27 He then went on (Hearings on H.R. 1809 before the House
28 Committee on Agriculture, June 19, 1947, 80th Cong., 1st
29 Sess. 3):

30 Another type [of large acreage use] is the
31 ski lifts which are installed under permits on
32 many of our high country winter sports areas.
The ski lift itself, extending up the hill,
with suitable space at each end for necessary

1 structures to operate it, and a place to
2 sell tickets and what not - and on most of our winter
3 sports areas we need two or three of those,
4 and it is really better to have them all operated
by the same concern under our supervision -
and there the aggregate acreage will almost
always exceed 5 acres.

5 Well those are types of use which we feel
6 are very desirable in the national forest, and
7 under our present set-up, where the acreage exceeds
8 5, we have to split the permit, giving them one
9 term permit under our existing authority for
not more than 5 acres, and the rest of the under-
taking has to be covered by the terminable type
of permit, which is terminable at the discretion
of the Chief of the Forest Service.

10 Mr. Granger therefore supported the increase in the amount
11 of land which could be leased under a term permit to 80 acres
12 to cover all such extensive activities as ski lifts.

13 In 1956, Congress responded to this problem by passing
14 legislation allowing the Forest Service to grant term permits
15 for as much as 80 acres for hotels and resorts. 70 Stat. 708,
16 U.S.C. 497. In doing so, Congress made clear that the
17 term permit was intended to include all permanent facilities
18 and not merely a portion of them. The letter of the Secretary
19 of the Interior to the Chairman of the Senate Committee
20 concerning the bill expressly states that S. 2216, which
21 became 16 U.S.C. 497, "would meet needs to grant term
22 permits up to 80 acres for such public and semi-public uses
23 as landing fields, resorts, . . . and ski lifts"
24 S. Rep. No. 2511, 84th Cong., 2d Sess. 3; H.Rep. No. 2792,
25 84th Cong., 2d Sess. 3 (1956). With respect to the issues
26 in this case, there can be little doubt that Congress intended
27 that ski lifts and all other facilities should be within the
28 area of the term permit. Thus the so-called revocable permit
29 to be granted by the Secretary of Agriculture violates the
30 80 acre limit placed by Congress on land in national forests
31 for hotels and resorts.
32

1 2. The Secretary Is Not Authorized
2 by 16 U.S.C. 551 To Issue A
3 Permit for a Ski and Summer Resort
4 on Thousands of Acres of National
5 Forest Land

6 16 U.S.C. 551 provides that the Secretary -

7 "shall make provisions for the protection against
8 destruction by fire and depredations upon the
9 public forests . . . and he may make such rules
10 and regulations . . . to regulate their occupancy
11 and use and to preserve the forests thereon from
12 destruction"

13 This provision, on its face, is designed to require the
14 Secretary to protect the forests and allows him to issue
15 regulations to do so. It is not a grant of authority to
16 allow major new uses or to allow an amount of land to be
17 used far exceeding the acreage limitation specifically provided
18 by Congress. The defendants' interpretation of the Section is
19 absurd, as it would give them carte blanche to dispose of National
20 Forest land with no limit whatsoever.

21 The history of 16 U.S.C. 551 supports this construction.

22 In 1891, Congress gave the President authority to withdraw
23 lands from the public domain for national forest reservations.
24 26 Stat. 1103, 16 U.S.C. 471. On February 22, 1897, President
25 Cleveland exercised this authority by reserving thousands of
26 acres which had already been homesteaded. Congress was
27 concerned about the problem which resulted (29 Cong. Rec. 902):

28 Mr. Carter: In consequence of the hasty and
29 inconsiderate action thus pursued mining towns,
30 villages, patented mining claims, and the home-
31 stead claims of actual settlers were included
32 within a reservation and the people thus included were
33 advised by the proclamation that any attempt to
34 cut or to use any of the timber in or about their
35 homes would be visited with the pains and penalties
36 of law.

37 Mr. Pettigrew: On the 22nd day of February, without
38 any notice, . . . President Cleveland issued his
39 proclamation embracing within the forest reservations
40 21,000,000 acres of public lands occupied by settlers.
41 We had no notice, no chance to oppose or resist
42 the creation of the reservation, and yet, under the
43 law, the moment that reservation was created by

1 Executive proclamation persons who cut a tree
2 for fire wood or for any domestic purpose would
be liable to indictment.

3 As a result, Section 551 was adopted. 30 Stat. 35. Section
4 551 thus was designed to give the Secretary of Interior (later
5 the Secretary of Agriculture) authority to allow settlers to
6 cut wood and to carry out other activities incidental to
7 homesteading. Under its authority, for example, numerous
8 permits have been issued for grazing. See United States v.
9 Grimaud, 220 U.S. 506, 522 (1911); Light v. United States,
10 220 U.S. 523, 537 (1911). ¹²/ There is no suggestion that
11 Congress intended this provision to allow the large-scale
12 development of national forest land.

13 The interpretation of Section 551 by Congress, the courts,
14 and administrative agencies immediately after its passage
15 further confirms this construction. The Secretary of Interior
16 continued after, as before 1897, to seek specific legislation
17 from Congress, in order to allow railroads to cross national
18 forest land. 30 Stat. 729; id. at 783; Chicago, M. & St.P. Ry.
19 v. United States, 218 Fed. 288, 293-294 (9th Cir,1914), affirmed,
20 244 U.S. 351. The Court of Appeals for the Ninth Circuit stated
21 that "[i]t must have been the view of Congress that without
22 these enabling acts a railroad company had no right, under
23 the act of 1875, to cross forest reserves; otherwise there
24 was no need of their enactment." Id. at 294. Although
25 Section 551 is earlier described in the decision (id. at 292),
26 the court did not even think it was relevant enough in
27 determining the authority of the Secretary of Interior to
28 grant permits for railroad lines to mention it in that context.

29
30 ¹²/ Similarly, a more recent decision has upheld regulations
31 of the Secretary of Agriculture promulgated under Section 551
32 which prohibited the operation of motorized vehicles in an area
of a national forest designated as a primitive area. McMichael
v. United States, 355 F.2d 283 (9th Cir.,1965).

1 As a result, in 1899, Congress passed a statute which
2 allowed the Secretary of Interior to grant rights of way to
3 railroads. 30 Stat. 1233. This Court stated that the reason
4 for this statute is that the Secretary of the Interior was
5 previously, "properly so, as we think," seeking separate
6 legislation from Congress for each right of way. Chicago, Mil-
7 waukee, & St. Paul Ry. v. United States, 244 U.S. 351, 357 (1917).
8 There would have been no reason for this statute if, in 1897,
9 the Secretary of the Interior had been given authority to
10 issue permits for the construction of facilities like a rail
11 road line or resort.

12 Subsequently, in 1901, Congress passed a statute authorizing
13 revocable permits for rights of way through national forests
14 for electrical and telegraph lines, canals, ditches and other
15 water conduits, and water plants, dams, and reservoirs. 31
16 Stat. 790, 16 U.S.C. 79. Large numbers of revocable licenses
17 have been issued under this act and major enterprises have
18 been constructed involving millions of dollars. 30 Att'y
19 Gen. 263, 269 (1914). Again, if Section 551, passed in
20 1897, allowed the Secretary of Interior to grant revocable
21 permits for such permanent construction as a resort, there
22 would have been no need to pass a new statute allowing him to
23 grant permits for other kinds of construction.

24 In 1910, the Supreme Court directly construed Section 551.
25 In upholding grazing regulations issued by the Secretary of
26 Agriculture under that section, the Court emphasized that
27 (United States v. Grimaud, supra, 220 U.S. at 516):

28 The determination of such questions . . .
29 was a matter of administrative detail

30 In the nature of things it was impracti-
31 cable for Congress to provide general regulations
32 for these various and varying details of
management. Each reservation has its peculiar
and special features; and in authorizing the
Secretary of Agriculture to meet these local

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conditions, Congress was merely conferring administrative functions

. . . "[A]n owner may delegate to his principal agent the right to employ subordinates, giving them a limited discretion, so it would seem Congress might rightfully entrust to the local . . . [authorities] the determination of minor matters."

In concluding, the Court made the limited authority conveyed by Section 551 even more clear (id. at 523):

The Secretary of Agriculture could not make rules and regulations for any and every purpose As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provisions to protect them from depredations and from harmful uses.

In 1914, Attorney General McReynolds issued an opinion interpreting the 1901 statute concerning electrical and telegraph lines, canals, water plants, and dams. While he specifically described the 1897 statute and the grazing permits granted under it, he made clear that construction of major facilities came only within the 1901 statute. 30 Att'y Gen. 263, 267, 268-269.

In making its tentative conclusion on this point, the court of appeals relied principally on what it regarded as the

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1 administrative practice. It quoted from a 1956 House Report
2 (H. Rep. No. 2792, 84th Cong., 2d Sess. 2 (1956)):

3 The Department of Agriculture now
4 has adequate authority to issue revocable
5 permits for all purposes under the act of
6 June 4, 1897 (16 U.S.C. 551).

7 See also S. Rep. No. 2511, 84th Cong., 2d Sess. 1 (1956). The
8 court then said that "[t]he fact that the record discloses
9 that there are now a total of at least eighty-four recreational
10 developments on national forest lands in which there is such
11 a combination of the term permit and the revocable permit is
12 convincing proof of their legality" (R. 229).

13 We submit that upon reexamination, as this court is permitted,
14 it will become clear that the Ninth Circuit's initial position
15 is not correct. First, the so-called revocable permit in
16 this case is not truly revocable either in the law or in
17 fact: (1) the permit cannot be revoked at the discretion of
18 the government because a showing must be made either that the
19 land is needed for a more important public service or the holder
20 of the permit has acted unsatisfactorily (Forest Service
21 Manual Section 2716.3(1) and elaborate administrative review
22 is provided (id. at Section 1571.01; 36 C.F.R. 211.20-211.37);
23 (2) it is unlikely, at the least, that the government would
24 or legally could revoke a permit without reasonable cause
25 which would economically destroy a 35 million dollar project
26 constructed in reliance on permits issued by the government;
27 (3) the structures to be built by the developer are permanent
28 in nature; and (4) even if the permit were revoked, the land
29 cannot be restored after having been blasted and bulldozed.

30 Second, the administrative practice is too weak and incon-
31 sistent to support the burden placed on it. The administrative
32 practice and construction immediately after a statute has been
enacted is entitled to principal reliance. E.g., Houghton v.

1 Payne, 194 U.S. 88, 99-100 (1904); Norwegian Nitrogen Products
2 Co. v. United States, 288 U.S. 294, 315 (1933). This case is
3 not unlike United States v. Leslie Salt Co., 350 U.S. 383, 396
4 (1956), where this Court said that "[a]gainst the Treasury's
5 prior longstanding and consistent administrative interpretation
6 its more recent ad hoc contention as to how the statute should
7 be construed cannot stand." Here, as we have seen, both Congress
8 and the executive construed the 1897 statute for many years
9 not to permit the granting of permits for major construction
10 in national forests. The much later practice of the Secretary
11 of Agriculture ignoring the earlier construction is not entitled
12 to significant weight.

13 Administrative practice must also be uniform and long-
14 standing to be entitled to weight. E.g., Iselin v. United States,
15 270 U.S. 245, 251 (1926); United States v. Missouri Pac. Ry.,
16 278 U.S. 269, 280 (1929); Louisville & N.R. Co., v. United
17 States, 282 U.S. 740, 757 (1931). We have seen that the
18 practice here is not uniform. While we do not know how long
19 the practice of issuing so-called revocable permits for major
20 construction in national forests has existed, we do know
21 that if it has existed for long, it was inconsistent with
22 contemporaneous opinions of Attorneys General.

23 Moreover, the practice of the Secretary of Agriculture is
24 not part of a regulation, a ruling, or any considered construc-
25 tion of the statute. The Secretary's practice amounts to
26 nothing more than an attempt to extend his authority beyond
27 what Congress has granted him.

28 The courts have frequently refused to rely on such unautho-
29 rized administrative practice. Recently, in Investment
30 Company Institute v. Camp 401 U.S. 617 (1971)
31 the Supreme Court refused to give weight to the Comptroller
32 General's interpretation of a statute because, even though

1 the interpretation was embodied in a regulation, "the
2 Comptroller adopted no expressly articulated position . . .
3 as to the meaning and impact of the provisions. . . ."
4 In Baltimore & Ohio Ry. v. Jackson, 353 U.S. 325, 330-331 (1957),
5 this Court stated that "[i]t is true that administrative
6 determination is entitled to weight . . . but here there
7 has been no expressed administrative determination of the
8 problem." Similarly, in Toucey v. New York Life Ins. Co.,
9 314 U.S. 118, 140 (1941), the Court refused to rely on an
10 alleged administrative practice:

11 We are not dealing here with a settled
12 course of decisions Only a few
13 recent and episodic utterances furnish
a tenuous basis for the exception which
we are now asked explicitly to sanction.

14 Accord, Sanford's Estate v. Commissioner, 308 U.S. 39, 52 (1939)
15 (lack of published rulings); United States v. San Francisco,
16 310 U.S. 16, 31 (1940); Nantahala Power & Light Co. v. Federal
17 Power Commission, 384 F.2d 200, 206 (C.A. 4, 1967), certiorari
18 denied, 390 U.S. 945 (comments by the Commission and its staff).

19 Third, the only practice which has been called to the
20 attention of Congress has been unclear at best. In 1947,
21 C.M. Granger of the Forest Service testified before the House
22 Committee on Agriculture that since resorts and other major
23 activities could not be encompassed on 5 acres of land,
24 as 16 U.S.C. 497 then provided, the Forest Service was
25 granting revocable permits for additional land. Hearings
26 on H.R. 1809, June 19, 1947, 80th Cong., 1st Sess. He there-
27 fore argued on behalf of a bill, H.R. 1809, which would have
28 allowed term permits for resorts for 80 acres. When such a
29 bill passed in 1956, Congress presumably believed that it was
30 eliminating the need for revocable permits for resorts. 70
31 Stat. 708, 16 U.S.C. 497.

32 The single, unexplained sentence in the 1956 Reports is at

1 best too unclear to show that Congress knew, and approved,
2 of revocable permits for resorts. It is likely that the
3 sentence means only that the Secretary has ample authority
4 to issue revocable permits for temporary uses which do not
5 require term permits. This interpretation of this sentence
6 is strongly supported by the letter of the Acting Secretary
7 of Agriculture which is included in the Report and which states
8 clearly that "[u]nder existing laws this Department has
9 adequate authority to issue revocable permits for use for
10 which long-term tenure is unnecessary or undesirable." H.
11 Rep. No. 2792, 84th Cong., 2d Sess. 3 (1956); S. Rep. No.
12 2511, 84th Cong., 2d Sess. 3 (1956). Moreover, the Forest
13 Services' own Manual states that revocable permits are "generally
14 for use of short duration." Section 2711.2(5).

15 The court of appeals noted that "there are now a total of
16 at least eighty-four recreational developments on national
17 forest lands in which there is such a combination of the
18 term permit and the revocable permit" (R. 229).
19 However, many of these permits may involve situations where
20 no major, permanent facilities have been constructed outside
21 land subject to the 80-acre term permit. In any event, there
22 is no indication that these developments have been called to
23 the attention of Congress, let alone even implicitly approved.

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1 The existence of these permits, many in violation of law,
2 cannot justify an additional attempt of the Secretary to
3 dispose of federal forest land in excess of his authority. 13/

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9 13/ To the extent that substantial interests have grown up
10 based on the Secretary of Agriculture's past action in granting
11 so-called revocable permits for resorts and other major
developments, this Court might desire to apply its construction
of Section 551 prospectively.

12 The Supreme Court has increasingly in recent years limited
13 its decisions in the field of criminal law prospectively, even
14 though constitutional issues were involved, when the purpose
15 of the new decision would not have been served by retroactive
16 application, when law enforcement agencies had relied in good
17 faith on prior decisions, and when there would have been a
18 serious effect on the administration of justice. E.g., Johnson
v. New Jersey, 384 U.S. 719, 726 (1966); Stovall v. Denno, 388
U.S. 293, 297 (1970). Applying these standards here, there
would be little reason to hold that past revocable permits
should be invalidated when major investments have been based
in reliance upon them and any damage which has resulted to the
national forests probably cannot be removed.

19 These same principles apply to civil cases. See Linkletter
20 v. Walker, 381 U.S. 618, 627 (1965). The Supreme Court has
21 long recognized that "[t]he past cannot always be erased by
22 a new judicial declaration" (Chicot County Drainage District v.
Baxter State Bank, 308 U.S. 371, 374 (1940), and has often
23 refused to apply decisions retroactively. E.g., Gelpecke v.
Dubuque, 68 U.S. (1 Wall.) 175 (1863) (legality of bonds);
24 Douglass v. Pike County, 101 U.S. 677, 687 (1880) (same);
25 Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (unconsti-
26 tutionality of limiting voters in bond elections to property
27 holders); Phoenix v. Kolodziejski, 399 U.S. 204, 214 (1970)
(same); Rabin v. Rowan Memorial Hospital, 269 N.C. 1, 152 S.E.
2d 485, 499 (1967) (Overruling tort immunity of charitable
28 hospitals). "Where a decision of this Court could produce sub-
29 stantial inequitable results if applied retroactively, there is
30 ample basis in our cases for avoiding the 'injustice or hardship'
31 by a holding of nonretroactivity." Cipriano v. City of Houma,
32 supra, 395 U.S. at 706. It is particularly clear that
the construction of a statute by a federal agency can be made
prospective if needed to prevent injustice. Safarik v. Udall,
304 F.2d 944, 950 (C.A. D.C., 1962), certiorari denied,
371 U.S. 901 (authority of Secretary of Interior to make change
of construction of statute affecting oil and gas leases
operative prospectively); see National Labor Relations Board v.
Majestic Weaving Co., 355 F.2d 854, 860-861 (C.A. 2, 1966);
Chicago v. Federal Power Commission, 385 F. 2d 629, 642
(C.A. D.C., 1967).

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1 IV

2 CONSIDERATION OF PLAINTIFFS' SECOND CLAIM
3 FOR RELIEF SHOULD BE DEFERRED
4 UNTIL IT CAN BE DETERMINED
5 WHETHER OR NOT THAT CLAIM IS MOOT

6 Plaintiffs' second claim for relief relates to the
7 authority of the U.S. Park Service to issue permits for
8 access through the Park for facilities required to service
9 the resort project at Mineral King. As with plaintiffs'
10 first claim, plaintiffs' second claim is valid under certain
11 possible sets of fact. However, the claim may be
12 moot and, for that reason, this court should not address
13 itself to its validity until the question of mootness
14 has been clarified by defendants' counsel.

15 On the 18th of August, 1972, Governor Reagan signed Assembly
16 Bill No. 1556 (copy attached) which stated:

17 "Section 1. Section 576 of the Streets
18 and Highways Code is amended to read:

19 576. Route 276 from Route 198 near Three
20 Rivers to Mineral King Oak Grove."

21 The effect of this legislation is to delete as a State project
22 the proposed highway through Sequoia National Park. Thus, we
23 assume that the State's application to the Park Service for
24 the road is a dead letter.

25 This, however, is not all. On May 3, 1972, E. Gordon
26 Walker, President of Walt Disney Productions, Inc., issued a
27 document entitled "Remarks", which appeared as a full page
28 advertisement two days later in the San Francisco Chronicle.
29 That document stated, among other things, that

30 . . . We have now obtained approval from the
31 Forest Service to revise our Master Plan. These
32 major revisions were developed over the past two
33 years under the guidance of our Conservation
34 Advisory Committee, and we will not proceed with
35 this project unless this new plan is implemented.
36 (p. 2) (Emphasis added.)

37 * * *

1 1. As you know, the Disney plan now includes an
2 electrically-powered, cog-assisted railroad to
3 take visitors into the Mineral King Valley from
4 a point in Sequoia National Forest just east of
5 its common boundary with Sequoia National Park.
6 We propose the extension of this transportation
7 system westward across Sequoia National Park to a
8 termination point in the Oak Grove area, which is
9 below and outside the boundary of the National Park.

10 Preliminary engineering studies indicate that a
11 two-truck, cog-assisted, narrow gage railway would be
12 highly flexible, allowing the train to traverse the
13 National Park along the general path of the existing
14 access road, for which Tulare County holds the right-
15 of-way. . . (Emphasis added.) pp. 3-4.

16 * * *

17 4. The new proposal will eliminate the need for a
18 separate 66 KV power line across the National Park,
19 which had been estimated by Southern California Edison
20 Company as necessary to provide the initial burst of
21 power to start up the cog-assisted trains above the
22 National Park, where the access road would previously
23 have terminated.

24 The electrical requirements for the Mineral King
25 Valley area can now be supplied by a power line at a
26 fraction of that voltage, which would be buried
27 underground in the roadbed of the railroad. (Emphasis
28 added.) p. 7.

29 As a result of the above, it would appear that there will be
30 no power line or new road on National Park land. Instead a
31 railroad and the power line will be placed on the existing
32 roadbed of the present county road. (This road preceded the
existence of the Park and, while "through" the Park, has never
been owned by the Park Service).

As a result of the above, plaintiffs' second claim may
be moot and the issues of the road, road hearings and the
power line need not be decided by this court. The rule is,
of course, that "neither a district court nor an appellate
court should decide moot questions." 7 Moore, Federal Practice,
¶65.21, p. 1704 and cases cited at footnotes 35 and 36.

Plaintiffs respectfully suggest that the court refrain
from deciding whether or not to dismiss the second claim until
counsel for the defendants informs the court as to whether
the obvious is indeed a fact. Should the defendants for some

1 reason inform the court that they will persist in requiring
2 a road and power line in the park despite the wishes of the
3 State of California and Disney, plaintiffs would then seek
4 permission from the court to file a supplemental memorandum.

5 V

6 PLAINTIFFS' THIRD CLAIM FOR RELIEF,
7 INVOLVING THE NATIONAL ENVIRONMENTAL POLICY ACT,
8 IS SUFFICIENT AS A MATTER OF LAW

9 Defendants assert that plaintiffs' "third claim under
10 NEPA is premature and does not present a case or controversy."
11 Plaintiffs will demonstrate, herein, that they have stated a
12 sufficient claim under NEPA (the National Environmental Policy
13 Act, 42 U.S.C. §§ 4321 et. seq.). Thus, we will show that
14 we claim present and continuing violations of that law.
15 These violations come about because of defendants act of
16 approval of the development and do not depend on when construction
17 will actually begin. This will come clear as we summarize our
18 claims.

19 Plaintiffs allege in ¶3 that "aesthetic, environmental,
20 and recreational interests . . . would be injured by the
21 conversion of the area into a commercial ski development" and
22 that "mass development would obviously destroy the park
23 qualities of the area" and "destroy the scenic, natural,
24 wildlife and historic aspects of the Mineral King area."
25 Plaintiffs later allege that the project "will have a
26 permanent and substantial detrimental impact on the Mineral
27 King area including the scenery, natural and historic objects,
28 wildlife, soil, fish, water and vegetation." (¶22).

29 Plaintiffs further allege that this destruction will
30 come about because of a decision already made by the defendants.
31 Thus, plaintiffs allege that defendants solicited bids, (¶5),
32 granted Walt Disney Productions, Inc., a preliminary permit, (¶6),
and approved the plan of Walt Disney Productions (¶7). Plain-

1 tiffs allege that the approved plan includes, inter alia,
2 "an alpine village" (§7a), "ski lifts, cleared slopes, lift
3 lines, trails, roads, a cog-assisted railroad; water and
4 stream control features; avalanche dams and other recreational
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1 improvements throughout 13,000 acres . . ." (§7(b)). 14 /

2 Based on the approvals alleged to have been made,
3 plaintiffs allege that " . . . defendants BUTZ, LEISZ, and
4 JAMES intend to issue interim special use permits for the
5 actual commencement of construction and operation of the
6 described development" (§8) and that "the impending issuance
7 of permits to developer for construction and operation with
8 those plans and the acts of defendants BUTZ, LEISZ, and JAMES
9 in association therewith are in excess of statutory jurisdiction,
10 authority and limitations," for various stated reasons (§9).

11 All the above allegations are incorporated by reference
12 into plaintiffs' Third Claim for Relief (§21). Thus, it is
13 plaintiffs' allegations that defendants have in fact made a
14 harmful decision affecting the environment. Plaintiffs go on
15 to allege that that decision is now in violation of NEPA
16 because defendants have:

17 1) failed to make a decision "under §101(b) and 102(1)
18 of NEPA to prevent degradation of the Mineral King area and
19 to preserve the natural environment of the area as a wildlife
20 refuge." (§30);

21 2) failed to prepare and circulate for public comment
22 an environmental impact statement pursuant to §102(2)(C) (§31).

23 3) failed (a) "to 'consult with and obtain comments'
24 from any Federal agency with regard to the required detailed
25 statement, (b) to make copies of the required detailed
26 statement available to the President, the Council on Environ-
27 mental Quality and to the public and (c) to have the
28 required detailed statement accompany the proposed project
29 through the existing agency review process " as required by §102
(2)(C). (§32).

30 4) Failed to study, develop and describe appropriate
31 alternatives to the areas selected for development as
32 required by §102(2)(D) (§33).

14 / See pp. 9 and 10 infra, fn. 4, for full text of §7.

1 Opposed to this is the statement of defendants' lawyer
2 that:

3 "Since these defendants are not proceeding with
4 the Mineral King project without first complying with
5 NEPA, nor are they threatening to do so, and there
6 is no allegation that they are, there is no
7 controversy appropriate for judicial determination."

8 With all due respect to counsel for defendant, this statement
9 cannot lay the basis for a motion to dismiss. The bare
10 assertion of counsel that his client is complying with NEPA
11 does not controvert plaintiffs' allegation
12 that defendants are not in compliance. Furthermore, it is
13 clear from counsel's memorandum that compliance to the defendants
14 means nothing more than preparing and circulating an impact
15 statement. Plaintiff's allegations go far beyond this point.
16 Thirdly, and most importantly, defendants counsel places his
17 chief reliance on his notion that defendants cannot be out of
18 compliance because defendants are not "proceeding" with the
19 construction of the project.

20 However, it is not only the fact of "proceeding" which
21 plaintiffs seek review of. Rather it is also defendants
22 decision of approval we seek to review. It is plaintiffs'
23 allegation that the approvals have been made, have not been
24 rescinded, are illegal under NEPA, and cannot be made legal by
25 a post hoc study designed to rationalize the decision.

26 It is clear that NEPA procedures actually apply to a
27 "decision" rather than its implementation even though Section
28 102(2)(C) uses the word "action." In the first place, it really
29 makes no sense to have an impact statement accompany a matter
30 "through the agency review process", as Section 102(2)(C)
31 requires, after a decision is made. This is confirmed by the
32 Guidelines of the President's Council on Environmental Quality
(§2, 36 Fed. Reg. 7724, ELR 46049) of the Department of Agriculture
(Appendix C, ELR 46057); and of the Forest Service (§1940.3,

1 ELR 46058), all of which use the word "decision" and assume
2 that decision making is the "action" NEPA refers to. The
3 whole matter is made clear by an analysis of NEPA made by the
4 D.C. Circuit in Calvert Cliffs Coordinating Committee v. AEC,
5 449 F.2d 1109 at 1114 (D.C. Cir., 1971):

6 To ensure that the balancing analysis is carried
7 out and given full effect, Section 102(2)(C) requires
8 that responsible officials of all agencies prepare
9 a "detailed statement" covering the impact of particular
10 actions on the environment, the environmental costs
11 which might be avoided, and alternative measures
12 which might alter the cost-benefit equation. The
13 apparent purpose of the "detailed statement" is to
14 aid in the agencies' own decision making process and
15 to advise other interested agencies and the public of
16 the environmental consequences of planned federal
17 action. Beyond the "detailed statement," Section 102
18 (2)(D) requires all agencies specifically to "study,
19 develop, and describe appropriate alternatives
20 to recommended courses of action in any proposal which
21 involves unresolved conflicts concerning alternative
22 uses of available resources." This requirement,
23 like the "detailed statement" requirement, seeks to
24 ensure that each agency decision maker has before him
25 and takes into proper account all possible approaches
26 to a particular project (including total abandonment
27 of the project) which would alter the environmental
28 impact and the cost-benefit balance. Only in that
29 fashion is it likely that the most intelligent, optimally
30 beneficial decision will ultimately be made. Moreover,
31 by compelling a formal "detailed statement" and a
32 description of alternatives, NEPA provides evidence
that the mandated decision making process has in fact
taken place and, most importantly, allows those
removed from the initial process to evaluate and
balance the factors on their own.

* * *

23 We conclude, then, that Section 102 of NEPA mandates
24 a particular sort of careful and informed decision
25 making process and creates judicially enforceable
duties. (Emphasis added.) (429 F.2d 1115).

26 Should defendants actually implement their decision by
27 proceeding, plaintiffs remedy would be to move for a preliminary
28 injunction. As the case now stands, however, plaintiffs have
29 alleged that defendants have made an unlawful decision which
30 they will eventually implement unless permanently restrained.
31 It is our further allegation that that decision is at this
32 moment illegal. This states a claim for relief and cannot be

1 controverted by counsel's statements.

2 Plaintiffs set forth in their memorandum in support of
3 their motion to amend (filed June 2, 1972, pp. 9-17) a complete
4 legal analysis of the validity of their third claim. It is
5 clear from this analysis that plaintiffs have stated a claim
6 as a matter of law. Because defendants' counsel has challenged
7 nothing in that memorandum it is unnecessary to repeat it
8 here.

9 It may be of profit to the court, however, if some
10 additional observations on/ NEPA are made. One may wonder why
11 NEPA applies if the decision to proceed with the project was
12 made in 1969, before NEPA was passed, and

13 why defendants concede that NEPA applies and state
14 that, sooner or later, they will comply. (Admitting indirectly
15 that they have not yet complied).

16 The reason that defendants concede the point is clear
17 from the law and the many cases under it. NEPA states that:

18 "Sec. 102. The Congress authorizes
19 and directs that, to the fullest extent
20 possible (2) all agencies of the
Federal government shall . . ." [carry
out the various duties here in contention.]

21 The language "to the fullest extent possible" has been inter-
22 preted, not as a limitation, but to mean that the act is
23 applied to the maximum extent that it can be in all Federal
24 matters, regardless of when action began. As the court stated
25 in the Calvert Cliffs decision:

26 Of course, all of these Section 102 duties are
27 qualified by the phrase "to the fullest extent possible."
28 We must stress as forcefully as possible that this
29 language does not provide an escape hatch for foot-
30 dragging agencies; it does not make NEPA's procedural
31 requirements somehow "discretionary." Congress did
not intend the Act to be such a paper tiger. Indeed,
the requirement of environmental consideration
"to the fullest extent possible" sets a high standard
for the agencies, a standard which must be
rigorously enforced by the reviewing courts.

32 Unlike the substantive duties of Section 101(b),

1 which require agencies to "use all practicable
2 means consistent with other essential considerations,"
3 the procedural duties of Section 102 must be fulfilled
4 to the "fullest extent possible." This contrast,
5 in itself, is revealing. But the dispositive
6 factor in our interpretation is the expressed views
7 of the Senate and House conferees who wrote the
8 "fullest extent possible" language into NEPA.
9 They stated:

10 ". . . The purpose of the new language
11 is to make it clear that each agency of the
12 Federal Government shall comply with the
13 directives set out in . . . [Section 102(2)]
14 unless the existing law applicable to
15 such agency's operations expressly prohibits
16 or makes full compliance with one of the
17 directives impossible Thus, it is
18 the intent of the conferees that the
19 provision 'to the fullest extent possible'
20 shall not be used by any Federal agency
21 as a means of avoiding compliance with the
22 directives set out in Section 102. Rather,
23 the language in section 102 is intended to
24 assure that all agencies of the Federal
25 Government shall comply with the directives
26 set out in said section 'to the fullest
27 extent possible' under their statutory
28 authorizations and that no agency shall
29 utilize an excessively narrow construction
30 of its existing statutory authorizations to
31 avoid compliance."

32 Thus the Section 102 duties are not inherently flexible.
They must be complied with to the fullest extent,
unless there is a clear conflict of statutory authority
Considerations of administrative difficulty, delay
or economic cost will not suffice to strip the
section of its fundamental importance. 449 F.2d
at ___ (Emphasis in original.)

1114-1115

1 In a great number of very recent cases federal courts,
2 including this Court, have enjoined projects initiated prior
3 to January 1, 1970, until and unless there is compliance with
4 Section 102(2)(C). E.g., Lathan v. Volpe, 455 F.2d 1111 (9th
5 Cir., 1971); Brooks v. Volpe, ___ F.2d ___ No. 71-1908, 9th
6 Cir., Mar. 2, 1972); Arlington Coalition v. Volpe, ___ F.2d ___,
7 3 ERC 1995 (No. 71-2109, 4th Cir., April 4, 1972); Environmental
8 Defense Fund v. Corps of Engineers, 325 F.Supp. 749, 757 (E.D.
9 Ark., 1971); Nolop v. Volpe, 333 F.Supp. 1364 (D.So.Dak., 1971);
10 Morningside-Lenox Park Association v. Volpe, 334 F.Supp. 132
11 (N.D. Ga., 1971). See also, Greene County Planning Board v.
12 FPC, 455 F.2d 412 (2d Cir., 1972); Daly v. Volpe, ___ F.Supp.
13 ___ (No. 9490, W.D. Wash., March 31, 1972); and Businessmen v.
14 D.C. City Council, 339 F.Supp. 793 (No. 99-72, D. D.C., March
15 15, 1972).

16 In the Ninth Circuit case of Lathan v. Volpe, supra, a
17 unanimous panel of that court enjoined a multi-million dollar
18 interstate highway project that received initial federal
19 approval in 1963. After referring to the requirements of the
20 Guidelines of the Council on Environmental Quality set forth
21 above, the Court stated that "federal highway officials should
22 have begun preparation of a Section 102(2)(C) statement
23 immediately after passage of NEPA." 455 F.2d at 1121 (Emphasis
24 added.) The Court further noted that "[n]either the federal
25 nor state defendants has complied with the requirements of the
26 statute and regulations by submitting environmental impact
27 statements, although acquisition of property for I-90 has
28 proceeded with evidence of consequent adverse effects on the
29 environment."^{15/}

30
31 ^{15/} Id., Brooks v. Volpe, 319 F.Supp. 90 (W.D. Wash., 1970),
32 rev'd, ___ F.2d ___ (No. 71-1908, 9th Cir., March 2, 1972) in-
volved a separate segment of the same interstate highway

(footnote continued next page)

1 The Guidelines of the President's Council on Environ-
2 mental Quality interpreting NEPA codify this point in the
3 following language in Section 11:

4 Application of section 102 (2) (C) procedure to
5 existing projects and programs. To the maximum
6 extent practicable the section 102 (2) (C) procedure
7 should be applied to further major Federal actions
8 having a significant effect on the environment
9 even though they arise from projects or programs
10 initiated prior to enactment of the Act on
11 January 1, 1970. Where it is not practicable
12 to reassess the basic course of action, it is still
13 important that further incremental major actions be
14 shaped so as to minimize adverse environmental
15 consequences. It is also important in further
16 action that account be taken of environmental
17 consequences not fully evaluated at the outset
18 of the project or program. 36 Fed. Reg. p. 7727.
19 ELR 46502 (April 23, 1971).

20 The language of the Forest Service's own NEPA regulations
21 is almost identical. See Emergency Directive No. 1 of July 13,
22 1971, ¶1941.3, ELR 46059.

23 The issue of how NEPA is to be implemented in cases such
24 as this is clear. The cases cited above are ones in which
25 construction or land acquisition had begun before suit was
26 filed, whereas here only approval has taken place. In this
27 case, far easier than those cited, the decision to proceed
28 is to be reassessed in accordance with the full NEPA procedures.
29 This interpretation is confirmed by the clear implication of
30 §11 of the CEQ Guidelines quoted above (and the Forest Service
31

32 15/ Continued involved in Lathan. The lower court refused
to apply the NEPA, stating as follows (319 F.Supp. at 91):

 The administrative interpretation with respect
to the highway location was made in 1967. To
give effect to plaintiffs contention would require
a retrospective application of Section 102. A
statute will not be construed as retrospective,
however, unless the Act clearly, by express language
or necessary implication, indicates Congress so
intended. It is the Court's view that the section
in question operates only prospectively.

 This Court reversed the lower court, simply stating that the
district court's view of NEPA's applicability had been
rejected in Lathan.

1 regulations(cited above), that:

2 Where it is not practicable to reassess the
3 basic cause of action, it is still important
4 that incremental major actions be shaped so
as to minimize adverse environmental con-
sequences.

5 Thus, in summary, it is clear that the plaintiffs' third
6 claim for relief is sufficient as a matter of law and that
7 there is no substance to defendants' argument that it is
8 deficient.

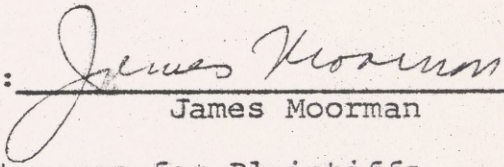
9 CONCLUSION

10 In conclusion, it is clear from the above that the
11 plaintiffs' first and third claims are well pleaded and, for
12 that reason, should not be dismissed. In addition, it now
13 appears that plaintiffs' second claim is moot and should not
14 be considered by the court pending confirmance or denial by
15 defendants' counsel. Therefore, plaintiffs pray that
16 defendants motion to dismiss be denied.

17 DATED:

18 August 29, 1972

JAMES MOORMAN
JOHN HOFFMAN
BARRY FISHER
LELAND R. SELNA, JR.

21 By: 
22 James Moorman

23 Attorneys for Plaintiffs

24 ROBERT W. JASPERSON
25 GREGORY ARCHBALD

26 Of Counsel
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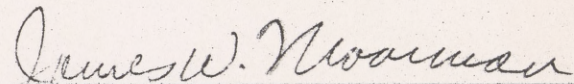
1 CERTIFICATE OF SERVICE

2 The undersigned certifies that he is an active member
3 of the State Bar of California; that he is not a party to
4 the within cause; that his business address is 311 California
5 Street, Suite 311, San Francisco, California 94104; that he
6 caused an envelope to be delivered to the following named
7 person at his respective address; that he enclosed and
8 sealed in each envelope a copy of the foregoing and attached:

9 Plaintiffs' Memorandum of Points and Authorities
10 In Opposition To Defendants' Motion
To Dismiss The Amended Complaint

11 on August 29, 1972.

12 RODNEY HAMBLIN, ESQ.
13 Assistant United States Attorney
14 Federal Building, Room 16427
450 Golden Gate Avenue
San Francisco, California 94102

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17 JAMES MOORMAN
18 Sierra Club Legal Defense Fund, Inc.
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